

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

UPS GROUND FREIGHT, INC.,)	
)	
Petitioner/Cross-Respondent,)	
)	
v.)	
)	
NATIONAL LABOR RELATIONS BOARD,)	
)	Nos. 18-1161, 18-1182
Respondent/Cross-Petitioner,)	
)	
and)	
)	
INTERNATIONAL BROTHERHOOD OF)	
TEAMSTERS, LOCAL 773,)	
)	
Intervenor .)	

**UPS GROUND FREIGHT, INC.’S MOTION
TO LODGE DOCUMENTS WITH THE COURT**

To the Honorable, the Judges of the United States
Court of Appeals for the D.C. Circuit:

UPS Ground Freight, Inc., (“UPS F” or the “Company”) respectfully requests permission to lodge with the Court two e-mail communications relevant to the Court’s consideration of UPS F’s Petition for Review. In support of this motion, UPS F states as follows:

1. By the Court’s Order dated December 17, 2018, the Joint Appendix in this matter is due to be filed today.

2. This is a technical refusal to bargain case in which UPSF is challenging the application of the NLRB's representation case procedures in an underlying union representation election. During the representation proceeding, and after UPSF submitted its pre-hearing statement of position, the hearing officer solicited a pre-hearing offer of proof from UPSF on one of the issues raised in the Company's statement of position (namely, that an employee in the proposed bargaining unit was a statutory supervisor who tainted the Union's showing of interest). See Exhibit A.

3. UPSF responded to the hearing officer's request by submitting an offer of proof. See Exhibit B.

4. In its briefs to the Court, UPSF argues that the Board's handling of the Company's supervisory taint allegations influenced the outcome of the representation proceeding in a way that prejudiced UPSF. As such, Exs. A and B are relevant to the Court's consideration of the issues in this case.

5. Although the parties agree on the remainder of the Joint Appendix, the Board objects to the inclusion of Exs. A and B in the Joint Appendix on the grounds they were not part of the record before the Board in the representation proceeding or in the subsequent refusal to bargain proceeding.

5. However, the Board does not object to UPSF's request to lodge the e-mails in connection with the arguments it has raised in its briefs.

6. Accordingly, UPSF respectfully requests that the Court grant it permission to lodge Exhibits A and B with the Court.

Dated: January 23, 2019

Respectfully submitted,

/s/ Kurt G. Larkin

Kurt G. Larkin, Esq.

HUNTON ANDREWS KURTH LLP

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(804) 788-8776

*Counsel for Petitioner/Cross-Respondent,
UPS Ground Freight, Inc.*

**CERTIFICATE OF COMPLIANCE
WITH TYPEFACE AND WORD COUNT LIMITATIONS**

I, Kurt G. Larkin, counsel for petitioner and a member of the Bar of this Court, certify pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) that the foregoing UPS Ground Freight, Inc.'s Motion to Lodge Documents With The Court is proportionately spaced, has a typeface of 14 points or more, and contains 326 words.

Dated: January 23, 2019

/s/ Kurt G. Larkin
Kurt G. Larkin, Esq.

*Counsel for Petitioner/Cross-Respondent,
UPS Ground Freight, Inc.*

CERTIFICATE OF SERVICE

I, Kurt G. Larkin, counsel for petitioner and a member of the Bar of this Court, certify that on January 23, 2019, I caused a copy of the foregoing document to be filed with the Clerk through the Court's electronic filing system which will send notification of such filing to:

Linda Dreeben, Esq.
Kira Vol, Esq.
Eric Weitz, Esq.
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
linda.dreeben@nrlrb.gov
kira.vol@nrlrb.gov
eric.weitz@nrlrb.gov

Thomas H. Kohn, Esq.
Markowitz and Richman
123 S. Broad Street, Suite 2020
Philadelphia, PA 19109
tkohn@markowitzandrichman.com

/s/ Kurt G. Larkin

Kurt G. Larkin, Esq.

*Counsel for Petitioner/Cross-Respondent,
UPS Ground Freight, Inc.*

From: [O'Neill, Kathleen](#)
To: [Larkin, Kurt G.](#)
Subject: UPS Ground Freight 4-RC-165805
Date: Friday, December 18, 2015 3:42:18 PM

We have received your Statement of Position. Concerning the allegations of taint, you will not be permitted to put evidence of taint on the record. If you have evidence of taint, submit a brief description of your evidence and the names of the witnesses prior to the opening of the hearing on Monday. The Regional Director will determine whether or not he will need to conduct an investigation. We will have another Board Agent available to take statements on Monday on taint, if necessary.

Will you please submit the complete commerce questionnaire so I can have the commerce stipulation prepared prior to the hearing.

Give me a call when you land. 215-901-7379.

Kathleen O'Neill
National Labor Relations Board
615 Chestnut Street
7th Floor
Philadelphia, PA 19106

215-597-7645 (ph)
215-597-7658 (fax)

Larkin, Kurt G.

From: Larkin, Kurt G.
Sent: Monday, December 21, 2015 7:29 AM
To: Kathleen.oneill@nlrb.gov
Cc: Larkin, Kurt G.
Subject: Fwd: UPS Ground Freight 4-RC-165805

> Kathy,

>

> The Company's evidence of supervisory taint is as follows: Tammy Cadman is an administrative assistant permanently assigned at the Company's AAP Salina, Kansas distribution center. She has recently worked in a temporary capacity at the AAP Kutztown facility. In recent weeks, Frank Capetta approached her and asked her, "Do you know what's going on here." Ms. Cadman replied that she did not, to which Mr. Capetta replied: "We're going to try to get a union at this location, you may want to share that with your drivers." Ms. Cadman interpreted Mr. Capetta's comment to mean that he was organizing the Kutztown workplace and also that he wanted her to encourage the Road Drivers at UPSF's Salina, Kansas facility to unionize when she returned to that facility following her temporary assignment at Kutztown.

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> UPSF contends that Mr. Capetta is a supervisor within the meaning of the Act. If the Regional Director agrees, it is incumbent on the region to interview Ms. Cadman and any Kutztown Road Driver who either signed an authorization card or was included in any other showing of interest submitted by the Union. The Region must investigate to determine the extent to which Mr. Capetta was involved in the solicitation or signing of union cards and/or encouraging employees to support unionization at Kutztown. The Company was unable, in the inappropriately abbreviated period provided under the new NLRB representation procedures, to interview Kutztown Road Drivers; moreover, the Company believes it would be more appropriate for the Region to do so, notwithstanding the Jonny's Poultry rules, to avoid any allegation of interrogation the Union may assert were the Company to attempt on its own to obtain such information.

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> The Company reserves the right to offer additional evidence as it may develop during the course of this proceeding.

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> On Dec 18, 2015, at 3:42 PM, O'Neill, Kathleen

<Kathleen.oneill@nlrb.gov<<mailto:Kathleen.oneill@nlrb.gov>>> wrote:

>

> We have received your Statement of Position. Concerning the allegations of taint, you will not be permitted to put evidence of taint on the record. If you have evidence of taint, submit a brief description of your evidence and the names of the witnesses prior to the opening of the hearing on Monday. The Regional Director will determine whether or not he will need to conduct an investigation. We will have another Board Agent available to take statements on Monday on taint, if necessary.

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> Kathleen O'Neill

> National Labor Relations Board

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> Philadelphia, PA 19106

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